APPENDIX A

Opinion of the Supreme Court of Ohio

(Decided February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals for Lucas County

THE STATE, EX REL. EWING, APPELLEE, *v.* A MOTION PICTURE FILM ENTITLED "WITHOUT A STITCH" ET AL., APPELLANTS.

Criminal law—Exhibition of obscene motion picture film—Nuisances—Action to abate—R. C. 3767.01 et seq.——Constitutionality—Applicability, where single film exhibited — Remedies mandatory — Forfeiture of receipts not permitted—Order closing theater must be released, when—Evidence.

1. The exhibition of a single obscene motion picture film is sufficient to render a theater a nuisance as defined in R. C. 3767.01(C). (*State, ex rel. Keating, v. Vixen*, 27 Ohio St. 2d 278, followed.)

2. R. C. 3767.01 *et seq.* do not provide for or allow censorship of motion picture films prior to a judicial determination of obscenity.

3. R. C. 3767.01 *et seq.* prescribe a constitutionally permissible method for controlling the exhibition of obscene motion picture films.

4. Upon a judicial determination that a theater is exhibiting an obscene motion picture film, the trial court must (a) immediately issue a permanent injunction, pursuant to R. C. 3767.05, forbidding the future exhibition of the film by the defendants; (b) impose a tax of three hundred dollars, pursuant to R. C. 3767.08, upon the nuisance and any person maintain-

ing it; (c) order the removal and sale of all personal property used in conducting the nuisance pursuant to R. C. 3767.06, subject to certain exceptions provided therein; and (d) order the theater closed for one year, pursuant to R. C. 3767.06.

5. The one-year closing order mandated by R. C. 3767.06 must be released by the trial court if the owner of the premises pays the cost of the abatement action, files a bond in the full value of the property, and demonstrates to the court that he will not exhibit the particular film or films declared to be obscene.

6. R. C. 3767.01 *et seq.* do not permit the forfeiture of box office receipts derived from the exhibition of a motion picture film after it was declared to be obscene.

Appellee brought this obscenity-nuisance abatement action under R. C. 3767.01 *et seq.* against a motion picture film entitled "Without a Stitch," the manager of the local theater where the film was playing, the corporate owner of the theater, and the corporate owner of the distribution rights in the film.

The Court of Common Pleas held that the film was obscene and permanently enjoined the owners, appellants herein, from exhibiting the film. However, the court stayed execution of the injunctive order pending appellate review. As a result of the stay, appellants were permitted to exhibit the film after the judicial determination that the film was obscene.

The Court of Appeals affirmed the finding of obscenity and held that the film's exhibition by the theater rendered the theater itself a nuisance. The court held further that R. C. 3767.01 *et seq.* mandated that the theater be closed for one year and that a tax of three hundred dollars be imposed upon appellants and against the real property on which the theater is located. The Court of Appeals also required appellants to account for and pay to the Lucas County treasurer the box office receipts arising from the exhibition of the film after the effective date of the trial court's injunctive order.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Warren D. Wolfe and *Mr. James J. Clancy*, for appellee.

Messrs. Fuhrman, Gertner, Britz & Barkan, Mr. Harland M. Britz and *Mr. Edmund C. Grainger, Jr.*, for appellants.

O'NEILL, C. J. The granting of the motion to certify allowing this appeal removed the issue of obscenity from this case. There remain the following four issues: (1) The applicability of R. C. 3767.01 *et seq.* to a theater in cases involving the exhibition of a single obscene motion picture film; (2) the constitutionality of R. C. 3767.01 *et seq.* prescribing a method for controlling obscenity; (3) the mandatory or discretionary nature of the remedies set forth in R. C. 3767.01 *et seq.*; and (4) the availability of the nonstatutory remedy of forfeiture of box office receipts derived from the exhibition of a film after it was judicially determined to be obscene. Those issues will be analyzed in the same order as listed above.

I.

Appellants contend that, under R. C. 3767.01 *et seq.*, a theater may not be branded a nuisance unless there is evidence that it has exhibited more than one obscene film; that the entire thrust of the trial court proceeding was directed at appellee's allegation that the film "Without A Stitch" was obscene. Appellants' contention is based upon the following statutory definition of nuisance contained in R. C. 3767.01(C):

> "'Nuisance' means * * * any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives * * * are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. * * *"

Appellants emphasize the use of the plural in that statute to describe when the exhibition of filmed obscenity renders the theater a nuisance, and contend that this is an express legislative declaration that a theater is not a nuisance if the proceedings disclose the exhibition of only one obscene film. However, Webster's Third New International Dictionary defines "motion picture" as "a series of pictures (as photographs taken with a special camera) presented to the eye in very rapid succession * * *." R. C. 3767.01(C) explicitly states that a place which exhibits "obscene * * * film or plate positives * * * " is a nuisance, and therefore the statute is broad enough to include the exhibition of a single obscene film, which is composed of a number of film positives.

This court has already recognized that R. C. 3767.01 *et seq.* can be utilized against the exhibition of a single motion picture. *State, ex rel. Keating, v. Vixen* (1971), 27 Ohio St. 2d 278, 272 N. E. 2d 137 *(judgment vacated and cause remanded,* 413 U. S. 905, 37 L. Ed. 2d 1016, *former judgment adhered to* [1973], 35 Ohio St. 2d 215, 301 N. E. 2d 880), involved the exhibition of the film "Vixen." In a *per curiam* opinion this court (27 Ohio St. 2d, at page 285) concluded that "where *scenes* in *a* motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those *scenes* * * * constitute a 'nuisance' within the meaning of R. C. 3767.01, and their exhibition may be enjoined as provided in R. C. 3767.02 *et seq.*" (Emphasis added.)

A federal district court has also upheld the use of R. C. 3767.01 *et seq.* to enjoin the exhibition of a single obscene film. *Grove Press v. Flask* (N. D. Ohio 1970), 326 F. Supp. 574, held that the film "I Am Curious (Yellow)" was obscene, and that R. C. 3767.01 *et seq.* could be invoked to prohibit its showing.

This court holds that R. C. 3767.01 *et seq.* are applicable in cases involving the exhibition of a single motion picture film.

II.

Appellants contend that R. C. 3767.01 *et seq.* are constitutionally impermissible as a means of controlling obscenity. Before the merits of this contention can be discussed, the procedures specified in R. C. 3767.01 *et seq.* and utilized in the present case must be understood.

R. C. 3767.03 permits any citizen of a county in which there allegedly exists a nuisance to bring an abatement action in the name of the state. R. C. 3767.04 provides for the filing and disposition of an application for a temporary injunction. The appellee did file such an application in this case. R. C. 3767.04 also requires that the application for a temporary injunction be heard within ten days of filing, and that all defendants be served with the complaint and notice of the time and place of hearing on the application for a temporary injunction at least five days before the hearing. In the present case, the application for a temporary injunction was filed on August 10, 1970, and a hearing was scheduled for August 19, 1970. However, on the hearing date the court continued the hearing until August 25, 1970, and consolidated that hearing with a hearing on the merits of issuing a permanent injunction.

R. C. 3767.05 provides that a nuisance abatement action "shall have precedence over all other cases except crimes, election contests, or injunctions." In this case, a three-day hearing commencing August 25, 1970, was held. It resulted in the issuance of a permanent injunctive order on September 16, 1970. The application for the temporary injunction was dismissed.

At this point, it should be noted that R. C. 3767.01 *et seq.* do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions, such as *Freedman v. Maryland* (1965), 380 U.S. 51, and *Teitel Film Corp. v. Cusack* (1968), 390 U.S. 139, which specify the constitutional requirements of such a system, are not applicable. Under R. C. 3767.01 *et seq.*, the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which

all the parties can present evidence on the allegation of obscenity.

Appellants list seven specific reasons why R. C. 3767.01 *et seq.* are unconstitutional as a means for controlling obscenity. First, appellants allege that the definition of nuisance contained in R. C. 3767.01(C) is overbroad. In essence, the statute states that any place which exhibits filmed obscenity is a nuisance, and this court has held that only activity which violates R. C. 2905.34[1] and R. C. 2905.35[2] constitutes a "nuisance" within the meaning of R. C. 3767.01

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[1]R. C. 2905.34 provides:

"As used in sections 2903.13 to 2903.16 inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

"(A) any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting beastiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

"(B) 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

"(C) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(D) 'Sexual conduct' means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(Footnote continued on following page)

(C). *State, ex rel. Keating v. Vixen, supra* (27 Ohio St. 2d 278). Upon remand of the *Vixen* case from the United States Supreme Court, this court also held (35 Ohio St. 2d 215) that the definition of obscene material contained in R. C. 2905.34 comports with the constitutional definition of the word "obscenity" as enunciated in *Miller v. California* (1973), U. S. , 93 S. Ct. 2607. Since an obscenity-nuisance abatement action under R. C. 3767.01 *et seq.* is limited to the exhibition of obscene material as defined in R. C. 2905.34, and since R. C. 2905.34 is not overbroad, it follows that the definition of nuisance contained in R. C. 3767.01(C) is not overbroad.

Appellants next argue that R. C. 3767.01 *et seq.* are constitutionally deficient because they do not require that defendants in obscenity abatement actions have knowledge of the contents of the film, a requirement which appellants contend is an essential ingredient of legitimate governmental regulation of obscenity. It was held in *Smith v. California* (1959), 361 U. S. 147, that a local obscenity

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"(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

"(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

[2]R. C. 2905.35 provides:

"No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

"Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both."

ordinance imposing criminal penalties on a bookstore owner for mere possession in the store of a book later judicially determined to be obscene, even if the owner had no knowledge of the contents of the book, was a violation of freedom of the press. The court reasoned that any absolute criminal liability regulation would necessarily force bookstore owners to restrict the books they sell to those they have inspected, which would result in a restriction on the distribution of constitutionally protected, as well as obscene, books. The rationale in *Smith v. California* cannot logically be limited either to purely criminal statutes or to bookstore owners; it is applicable whenever the state attempts to penalize a person, on obscenity grounds, for engaging in an activity normally protected by the First and Fourteenth Amendments to the United States Constitution.

The exhibition of films is an activity normally protected by the First and Fourteenth Amendments. *Kingsley International Picture Corp. v. Regents* (1959), 360 U. S. 684, R. C. 3767.01 *et seq.* penalize persons engaged in the exhibition of obscene films in that R. C. 3767.06 requires that all personal property used in conducting the nuisance be sold and R. C. 3767.08 imposes a tax of three hundred dollars upon persons maintaining the nuisance and upon the theater and the real property on which it is located. Therefore, those penalty provisions can be imposed only if the persons upon whom they are sought to be imposed had knowledge of the content of the film declared to be obscene.

This requirement of *scienter* is not novel. In *State, ex rel. Keating, v. Vixen, supra* (27 Ohio St. 2d 278, 285), this court held that a film constitutes a nuisance which can be enjoined pursuant to R. C. 3767.01 *et seq.* only if scenes in the film violate R. C. 2905.34 *and* 2905.35. R. C. 2905.35 expressly requires knowledge of the contents of the film on the part of any person against whom that statute is sought to be invoked. Therefore, no individual can be penalized under R. C. 3767.01 *et seq.* for maintaining a theater in which an obscene film is exhibited unless it is shown that that person knew of the contents of the film. In the

present case, none of the appellants contended upon appeal that he did not have knowledge of the contents of the film.

Appellants' third reason for asserting that R. C. 3767.-01 *et seq.* are unconstitutional is the allegation that those statutes place the burden of proving that a film is not obscene upon the exhibitor. It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that the particular activity complained of is outside the scope of constitutional protection. *Freedman v. Maryland, supra* (380 U. S. 51); *Speiser v. Randall* (1958), 357 U. S. 513. However, R. C. 3767.01 *et seq.* do not place the burden of proof upon the defendants in an obscenity-nuisance abatement action. Since the statutes are silent on this point, the general rule, that the burden of proof is on the complainant, is applicable.

Appellants' fourth, fifth and seventh arguments concerning the constitutionality of R. C. 3767.01 *et seq.*, as a method for controlling obscenity, are premised upon the belief that the laws permit censorship without a prior judicial determination of obscenity. This contention has already been discussed and rejected in this opinion.

Appellants' final contention is that *Stanley v. Georgia* (1969), 394 U. S. 557, forbids governmental sanctions against the private possession of obscenity, and that R. C. 3767.01 *et seq.* do not expressly distinguish between private possession and public exhibition of obscenity. That argument was rejected by the United States Supreme Court in *Paris Adult Theater I. v. Slaton* (1973), 413 U. S. 49, 93 S. Ct. 2628, in which the court held that a commercial theater is not equivalent to a private home. Therefore, *Stanley v. Georgia* is not applicable to the exhibition of obscenity by a theater open to the public.

None of appellants' seven reasons for alleging that R. C. 3767.01 *et seq.* prescribe an unconstitutional method for controlling obscenity are valid. It is interesting to note that six of those reasons were also raised and rejected by the federal district court in *Grove Press v. Flask, supra* (326 F.Supp. 574).

This court holds that R. C. 3767.01 *et seq.* prescribe a constitutionally permissible method of controlling the exhibition of obscene films.

III.

Appellants contend that a trial court is not required to invoke every possible remedy provided in R. C. 3767.01 *et seq.* after finding a film to be obscene, and therefore the Court of Appeals erred in holding the remedies mandatory. However, an examination of the statutory language used in R. C. 3767.01 *et seq.* will show that the Court of Appeals was correct.

Upon a finding that a theater is exhibiting an obscene film, R. C. 3767.05, 3767.06 and 3767.08 dictate the relief to be granted. Each statute uses the word "shall" to describe the duty of the trial judge to impose the various remedies stated therein, and this court has held that the use of the word "shall" in a statute must be construed as imposing a mandatory duty unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinary meaning. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St. 2d 102. Since no such legislative intent appears in R. C. 3767.01 *et seq.*, the remedies imposed are mandatory.

There are four remedies contained in R. C. 3767.01 *et seq.* which must be invoked upon a finding that a theater is a nuisance as defined in R. C. 3767.01(C).

First, R. C. 3767.05 provides that the trial court enter a judgment perpetually enjoining defendants from maintaining the nuisance. In this case, the nuisance was the showing of the particular film declared to be obscene. Since R. C. 3767.05 mandates an immediate cessation of exhibiting the film, the trial court erred in permitting appellants to continue showing "Without A Stitch" pending appeal.

Second, R. C. 3767.08 requires the imposition of a three hundred dollar tax upon the nuisance and against any person maintaining it. The nuisance in a case involving a theater is defined by R. C. 3767.01(C) to include not only the theater itself, but also the real property upon

which it is located and the personal property used in conducting the nuisance. The question of what specific personal property is encompassed by the use in R. C. 3767.01 *et seq.* of the phrase, "personal property and contents" used in conducting and maintaining the nuisance, has not been raised in this case, and we need not answer it. As noted in our discussion under issue II, *Smith v. California, supra* (361 U. S. 147), interpreting the First and Fourteenth Amendments, requires knowledge of the contents of the film on the part of the person against whom the tax is sought to be imposed as a pre-condition to the imposition of such a tax.

The third mandatory remedy is found in R. C. 3767.06. It requires the removal and sale of all personal property used in conducting the nuisance. However, the owner of such personal property is permitted to escape the sale order by coming into court within ten days after the abatement order is filed and showing that he had neither actual nor constructive knowledge that his property was being used to maintain a nuisance.

The fourth remedy is also contained in R. C. 3767.06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained, for a period of one year. R. C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R. C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished. The nuisance is the exhibition of the particular film declared obscene. The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint on an activity generally protected by the First Amendment.

Freedman v. Maryland, supra (380 U. S. 51); *Speiser v. Randall, supra* (357 U. S. 513). The language of R. C. 3767.06 does not require a construction which would render the one-year closing provision unconstitutional, and this court will not so construe it.

IV.

The final issue in this case is the availability of the remedy of forfeiture of box offices receipts derived from the exhibition of a film after it has been declared to be obscene. As used in this opinion, the word "forfeiture" means the divestment of property without compensation in consequence of some act prohibited by law; such forfeitures are imposed "by the law-making power to insure a prescribed course of conduct." *Justice v. Lowe* (1875), 26 Ohio St. 372, 375. In his complaint appellee demanded that appellants forfeit all receipts derived from the exhibition of "Without A Stitch." The trial court reserved a decision on that issue pending the outcome of appellate review of its finding of obscenity. R. C. 3767.01 *et seq.* do not provide for such a forfeiture; therefore that portion of appellee's complaint demanding forfeiture should have been dismissed by the trial court.

However, the Court of Appeals did not order a forfeiture; it merely required that appellants account for and pay to the county treasurer the receipts obtained from showing "Without A Stitch" after the date on which the trial court's permanent injunction would have become effective had the judge not stayed it. This accounting was not imposed as a result of any illegal act on the part of appellants; it was, instead, a recognition by the Court of Appeals that the trial court erred when it stayed the effectiveness of its injunction order. As noted in our discussion under issue No. III, a trial court is required by R. C. 3767.05 to issue a permanent injunction when it declares a film to be obscene; it does not have the power to stay the effectiveness of the injunction. The only way the Court of Appeals could rectify that error was to assure that appellants did not profit thereby—which was the object of the accounting order.

The Court of Appeals did not specify whether appellants must account for gross receipts or net receipts. However, appellants should not be deprived of gross receipts, as this would unjustly penalize it for an error committed by the trial court. Had the trial court not stayed the injunction, appellant could have used the theater to show a non-obscene film. Therefore, fairness requires that this court construe the accounting order issued by the Court of Appeals to be limited to net receipts derived from exhibiting the film "Without A Stitch" after September 16, 1970, which was the filing date of the trial court's order declaring the movie obscene.

The judgment of the Court of Appeals is modified to reflect our holding that the trial court should have dismissed appellee's demand for forfeiture of all box office receipts derived from the exhibition of the film "Without A Stitch."

Judgment modified and affirmed as modified.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

Relevant Sections of the Ohio Revised Code

§ 3767.01. Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene

films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

§ 3767.02. Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

§ 3767.03. Abatement of nuisance bond.

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The

party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

§ 3767.04 Procedure in injunction action.

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. When such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the

time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if

satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

§ 3767.05. Priority of action; evidence; costs.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the com-

plainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

§ 3767.06. Content of judgment and order.

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days

after such order of abatement is made and prove innocence, to the satisfaction of the court of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

§ 3767.07. Court shall punish offender for violation of injunction or order.

In case of the violation of any injunction or closing order granted under sections 3767.01 to 3767.11, inclusive, of the Revised Code, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court or, in vacation, a judge thereof, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

§ 3767.08 Tax when permanent injunction issues; payment.

Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars. Such tax may not be imposed upon the personal property or against the owner thereof who has proved innocence as provided in section 3767.06 of the Revised Code, or upon the real property or against the owner thereof who shows to the satisfaction of the court or judge thereof at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained

of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return and the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected under section 2905.14 of the Revised Code.

§ 3767.09. Tax shall be imposed against owner of property.

When a nuisance is found to exist in any proceeding under sections 3767.01 to 3767.11, inclusive, of the Revised Code, and the owner or agent of such place whereon the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars, imposed under section 3767.08 of the Revised Code, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons

therein, and existing laws, regarding the service of process, shall apply to service in proceedings under sections 3767.01 to 3767.11, inclusive, of the Revised Code. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property affected by the action." Service thereon may be had by publication in the manner prescribed in sections 2703.14 to 2703.19, inclusive, of the Revised Code. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make defense thereto and have trial of his rights in the premises by the court and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

§ 3767.10. Lease void if building used for lewd purposes.

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises.

§ 3767.11. Procedure when nuisance established in criminal proceeding.

In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall pro-

ceed promptly, under sections 3767.01 to 3767.11, inclusive, of the Revised Code, to enforce such sections, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under such sections shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 3767.06 of the Revised Code, shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 3767.07 to 3767.11, inclusive, of the Revised Code.

§ 3767.99. Penalties.

(A) Whoever is guilty of contempt under sections 3767.01 to 3767.11, inclusive, of the Revised Code, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

(B) Whoever violates section 3767.12 of the Revised Code shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

(C) Whoever violates section 3767.13 of the Revised Code shall be fined not more than five hundred dollars.

(D) Whoever violates section 3767.14 of the Revised Code shall be fined not less than fifty nor more than one thousand dollars.

(E) Whoever violates section 3767.16 of the Revised Code shall be fined not less than ten nor more than fifty dollars, and in default of the payment of such fine and costs, such person shall be imprisoned not more than thirty days.

(F) Whoever violates section 3767.17 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

§2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, wtihout serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area,

or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Posses or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

(Filed June 13, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

(Title omitted in printing)

Notice is hereby given that Art Theatre Guild, Inc., James Wescott and Tonylyn Productions, Inc., the above named appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio modifying, and affirming as modified, the judgment of the Court of Appeals of Lucas County entered in this action February 7, 1974 and its denial of a motion for a new hearing April 4, 1974.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

BERNARD A. BERKMAN
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Counsel for Appellants

PROOF OF SERVICE

Copies of the within Notice of Appeal were served upon Warren D. Wolfe, 2001 Toledo Trust Building, Toledo, Ohio 43604, John F. Wetli, 2001 Toledo Trust Building, Toledo, Ohio 43604 and James J. Clancy, 9055 LaTuna Canyon, Sun Valley, California, attorneys for appellees, by depositing same in a U.S. Post Office mail box, so addressed, with air mail first class or first class postage prepaid where applicable pursuant to Rule 33 United States Supreme Court Rules, this 12th day of June, 1974.

/s/ BERNARD A. BERKMAN
Counsel for Appellants

APPENDIX D

Order of Ohio Supreme Court

(Filed February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO *ex rel.* CLARK L. EWING,
Appellee,

vs.

A MOTION PICTURE FILM ENTITLED
"WITHOUT A STITCH," *et al.,*
Appellants.

This cause, heard on appeal from the Court of Appeals for Lucas County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is modified, and as modified, affirmed for the reasons set forth in the opinion rendered herein and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 27 day of February 1974.

/s/ THOMAS L. STARTZMAN
Clerk

APPENDIX E

Mandate of Ohio Supreme Court

(Filed February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO
(Title omitted in printing)

To the Honorable Common Pleas Court within and for the County of Lucas, Ohio, Greetings:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

The judgment of the Court of Appeals is modified to reflect our holding that the trial court should have dismissed appellee's demand for forfeiture of all business office receipts derived from the exhibition of the film, and as modified, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN,
Clerk

APPENDIX F

Order of Ohio Supreme Court Denying Rehearing

(Filed April 4, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO *ex rel.* CLARK L. EWING,
Appellee,

vs.

A MOTION PICTURE FILM ENTITLED,
"WITHOUT A STITCH," *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

(Duly certified)

APPENDIX G

Opinion of the Court of Appeals of Lucas County, Ohio

(Decided July 9, 1971)

(Title omitted in printing)

HEADNOTES

Applying the tests set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957) and in A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass., 383 U.S. 413, 16 L.Ed. 2d. 1, 86 S.Ct. 975 (1966), the motion picture film "Without a Stitch" is obscene and the public exhibiting of it is a nuisance under the applicable provisions of Chapter 3767, R.C. Said provisions are constitutional; and when a permanent injunction is issued in a civil action for maintaining a nuisance, an order directing the effectual closing of the place, R.C. 3767.06, and imposing a tax, R.C. 3767.08-09, is mandatory.

Appeal on Questions of Law and Fact.

Messrs. Bugbee & Conkle and Mr. James Clancy for appellee.

Messrs. Fuhrman, Gertner, Britz & Barkan and Mr. Edmund C. Grainger, Jr., for appellants.

POTTER, *P.J.* This cause is before this court de novo. We have reviewed and weighed the evidence submitted in the court below and in this court. Fortunately, after July 1, 1971, the anomalous practice of one trial and one trial de novo is abolished, Rule 2, Ohio Rules of Appellate Procedure.

The case comes to this court on the complaint of the petitioner for an injunction to enjoin the exhibition of the motion picture film, "Without a Stitch," and to abate the same as a public nuisance in the City of Toledo, Ohio, pursuant to R.C. 3767.01 et seq. Answers were filed by the defendants James Westcott, Art Theatre Guild, Inc., and Tonylyn Productions, Inc. Mr. Westcott is the manager

of the theatre; Art Theatre Guild, Inc., is a corporation organized under the laws of Ohio and operates the Westwood Art Theatre and is wholly owned by Louis K. Sher. The defendant Tonylyn Productions, Inc., is a corporation organized under the laws of the state of California and it owns the distribution rights in and to the said film. Although we are to treat this case as if the cause had never been tried below (See *Lincoln Properties v. Goldsiager*, 18 Ohio St. 2d 154 (1969)), we note that the court below permanently enjoined the defendants and all persons acting for them from exhibiting the subject motion picture film, and that the defendants filed an appeal bond in the amount of $20,000 to perfect their appeal on law and fact and also to stay the execution of the lower court's injunction until final adjudication in the appellate courts of this state, including the Supreme Court of Ohio.

The essential issue before this Court is whether the film "Without a Stitch" is obscene and, therefore, subject to the provisions of R.C. 3767.01, et seq. To the extent the term "obscene" has been defined or is capable of definition, we look to *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) and as further elaborated in, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass.*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S. Ct. 975 (1966).

After reviewing the varied decisions since *Roth*, we appreciate the exasperation of some judges and authors when they suggest that the law is in a fragmented state of bewilderment. After such an examination, Justice Stewart's observation that "But I know it when I see it * * *", takes on new dimensions. It is not the purpose of this opinion to add to the already voluminous array of comment on this subject, but to set forth for property interested parties our reasoning, findings and conclusions.

In *Roth, supra*, Mr. Justice Brennan, who delivered the opinion of the court, made the following observations at page 484: "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," and then held the following

at page 485: "We hold that obscenity is not within the area of constitutionally protected speech or press." In *Roth*, also, was the answer to the presentation of obscenity in a closed theatre to consenting adults. Justice Brennan rejected this argument and proof of a clear and present danger of antisocial conduct is not required. In support thereof he cited *Beauharnais v. Illinois*, 343 U.S. 250.

The test laid down by *Roth* is found at page 489 of the opinion, as follows:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest * * *."

The court, in *Memoirs, supra* (1966), seized upon the words of the *Roth* case "* * * utterly without redeeming social importance" and fashioned the following definition of obscenity with three elements which must coalesce, 16 L. Ed. 2d. 1, at page 5:

> "* * * it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

This definition was quoted with approval in *State v. Mazes*, 7 Ohio St. 2d. 136, at page 137; reversed on other grounds, 388 U.S. 453, 18 L. Ed. 2d. 1315, 87 S. Ct. 2105.

In close cases it has been suggested that evidence of pandering may be probative with respect to the nature of the material in question. *Ginsburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d. 31 (1966); *P.B.I.C., Inc. v. Byrne*, 313 Fed. Supp. 757 (1970).

The case of *Stanley v. Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d. 542, 89 S. Ct. 1243, considered the private possession of obscene material, and the Supreme Court of the United States found that his was a protected activity. The court in that case reiterated that *Roth* still stood;

however, some scholars and judges, although we do not mean to imply that the two categories cannot coalesce, thought that they noted a hole in the dike. Thereafter, the country was inundated by a flood of obscenity and approving judicial decisions. The varied nature of the subject helped to confuse the issues, e.g., private possession, commercial exploitation, method and type of dissemination, e.g., books, pictures, movies, live presentation. See 50 *Am. Jur.* 2d 481, Lewdness, Indecency, and Obscenity, par. 26, re Motion Pictures. The individual positions of the Justices of the Supreme Court, plus a rash of per curiam reversals of state decision, helped spawn conflicting appellate decisions before and after Stanley. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d. 793, 84 S. Ct. 1676, *United States v. Klaw* (1965), 350 F.2d 155.

Two recent Supreme Court cases have done much to bring some semblance of order to the morass of obscenity decisions. The cases decided after the decision in the Lucas County Common Pleas Court support that decision and they are *United States v. Reidel* (May 1971), ___ U.S. ___, 28 L. Ed. 2d 813, 91 S. Ct. ___; and *United States v. Thirty-seven (37) Photographs, Milton Luros, Claimant*, ___ U.S. ___, 28 L. Ed. 2d. 822, 91 S. Ct. ___ (May 1971). These cases refuted the argument that *Stanley*, in effect, emasculated *Roth*. The principles of *Roth* are reaffirmed and *Stanley* is limited to the facts of that case. A "poor Stanley," constitutionally, may not have obscenity commercially distributed to him. In *Reidel*, 28 L. Ed. 2d. at page 816, the court said, "obscenity is not within the area of constitutionally protected speech or press," and then quoted *Stanley*, at page 817, as follows: "Roth and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad powers to regulate obscenity. * * *" In reference to the District Court, and perhaps other courts which have given *Stanley* too wide a sweep, see the following from *Reidel* at page 817:

> "* * * To extrapolate from Stanley's right to have and peruse obscene material in the privacy of

his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion adjured. Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—and dealings which Roth held unprotected by the First Amendment."

And at page 818:

"Roth and like cases have interpreted the First Amendment not to insulate obscenity from statutory regulations."

In the concurring opinion by Mr. Justice Harlan we find the following at page 818:

"Appellee here contends, in effect that the Stanley 'right to receive' language, 394 U.S. at 564-565, 22 L. Ed. 2d. at 549, constituted recognition that obscenity was constitutionally protected for its content. Governmental efforts to proscribe obscenity as such would, on this interpretation, not be constitutional; rather, the power of both the state and federal governments would now be restricted to the regulation of the constitutionally protected right to engage in this category of 'speech' in light of otherwise permissible state interests, such as the protection of privacy or the protection of children.

"That interpretation of Stanley, however, is flatly inconsistent with the square holding of Roth v. United States, 354 U.S. 476, 485, 1 L. Ed. 2d. 1498, 1507, 77 S. Ct. 1304 (1957): * * *

"Either Roth means that government may proscribe obscenity as such rather than merely regulate it with reference to other state interests, or Roth means nothing at all. * * *"

In *United States v. Thirty-Seven (37) Photographs*, 28 L. Ed. 2d 822, in reference to the commercial distribution of obscenity the court's observations at page 834 are appropriate.

"* * * Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. * * * Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution."

With this review we turn to the question of whether the plaintiff has carried his burden of proof. The evidence consisted of testimony, exhibits, and the viewing of the film by this Court at the request of all the parties. Despite this request, the defendants argue that this Court cannot consider this film as evidence, but that we must consider the viewing as if it were only a view of the place to enable us to better apply the evidence offered. In short, the defendants say that we cannot believe our eyes, an argument advanced with some success by the weavers of the king's clothes in the tale, *The Emporer's New Clothes*, written by an earlier Danish author, Hans Christian Andersen. This Court does not need a little boy's exclamation to establish that the king, in fact, had nothing on.

The cases clearly establish the right, if not the necessity, of the court to view the material; this the court has done. (See *Jacobellis v. Ohio*, (1964), 378 U.S. 174, 12 L. Ed. 2d. 793, 84 S. Ct. 1676; *Womack v. United States*, Court of Appeals, Dist. of Columbia (1961), 294 F. 2d. 204; *Evans Theatre Corp., et al., v. Slayton* (1971), S. Ct. of Georgia, 180, S.E. 2d. 712; *Kahm v. United States*, 300 F. 2d. 78.)

By any test, medium-core, hard-core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film was obscene. (See *State, ex rel., Sensenbrenner, v. Adult Bookstore* (1971), 26 Ohio App. 2d. 183; *Jacobellis v. Ohio* (1964), 378 U.S. 184, 12 L. Ed. 2d. 793, 84 S. Ct. 1676; *United States v. Klaw* (1965), 350 F. 2d. 155; *Morris v. United States*, 259 A. 2d. 337 (1969),

Dist. Court of Columbia Court of Appeals; Womack v. United States (1961), 294 F. 2d. 204; *Dunn v. Maryland State Board of Censors*, 213 A. 2d. 751 (1965)). However, considering the evidence and applying the tests as enumerated in *Roth v. United States, supra*, and as further elaborated in *Memoirs, supra*, we find that to the average person applying national contemporary community standards that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex, that the film goes substantially beyond customary limits of candor and affronts contemporary community standards relating to the description or representation of sexual matters; that the film is utterly without redeeming social value, that the three elements coalesce, and that the film, "Without a Stitch," is obscene. We have also considered as indicative but not conclusive of national standards the laws of the state of Ohio[1] and other states. See *Roth, supra*, page 485.

Briefly we state that the so-called "plot" is as follows: The principal participant is an unmarried, 17-and-a-half year old girl about to be a senior in high school. She found that when confronted with intimate relations with a male classmate she became frigid. To overcome what she concludes is an unusual attitude, she visits a doctor. The doctor proceeds to effect a cure, which cure includes a variety of sexual stimulations, including intercourse. Without his white coat and when the doctor was in the nude giving therapeutic treatment, with his numerous tattoos, he appeared to have interned with the Danish Merchant Marine. After treatment the young girl started on a hitchhiking tour of Europe to further effect her cure. Defendants argue that the scenery and photography was very good and this gives to the picture some redeeming social value. The photography is good and the scenery is interesting, but this is not a travelogue, and when the sun slowly sets in the west, it ushers in another night of sexual excess and aberration. This included nude scenes of vaginal and anal copulation, lesbian relations, participation in a "stag" film, fellatio, cunnilingus, and sex orgies between two women and a male, and two males and the "star" of the production, the display of a dildo, sadism and masochism. All

acts were simulated except the fondling and suckling of the patient's breast by the doctor. It is obvious that the presentation was to appeal to titillation, not travel.

As cured, the patient returns to her doctor to exhibit her new found radiant health and peace of mind. We find no social redeeming value in this film. If there is a plot, it was only a facade or pretext to exhibit what for years has been known as a "stag" film.

We find, further, that the defendants were pandering as defined in *Ginsburg v. United States, supra.* The defendants' sole emphasis was on the sexual, provocative aspects of this film. The advertising and promotional materials were slanted to appeal to the erotic interests of their customers.

Since this action is brought under R.C. 3767.01, et seq., we set forth the applicable provisions.

R.C. 3767.01:

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. * * *"

R.C. 3767.02:

"Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance

and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code."

Under the conditions set forth in R.C. 3767.03, any person of the county may bring in action in equity in the name of the state to abate the nuisance. The states have a choice of remedies with injunction being one. See *Kingsley Books, Inc., v. Brown* (1957), 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325; *People v. Linn* (1941), 18 Cal. 2d 872, 118 P.2d 472; *Evans Theatre Corp., et al., v. Slayton* (1971), ___ Georgia ___, 180 S.E.2d 712; 50 *Am. Jur.* 2d 464, Lewdness, Indecency and Obscenity, Par. 10.

The statute is a constitutionally permissible means of controlling obscenity. See 34 *O. Jur.* 2d 160, Lewdness, Indecency, Obscenity, and Profanity, Par. 8; *Grove Press, Inc., et al., v. Anthony B. Flask,* Civ. No. C 69-735, Dist. Ct. Northern Dist. of Ohio, Eastern Div.

Having found the film obscene, we also find that a nuisance, as defined in R.C. 3767.01, was maintained, the applicable provisions of R.C. 3767.01 et seq., are invoked and are mandatory. We permanently enjoin the defendants, and each and all persons acting for them, from exhibiting the subject motion picture film, the Westwood Art Theatre where the film was exhibited is ordered closed for one year from the date of the judgment entry to be filed in this court (R.C. 3767.06); a tax of $300.00 is imposed on the defendants and against the real property upon which is located the Westwood Art Theatre (R.C. 3767.08). The lower court having enjoined the exhibiting of the film and the defendants desiring to stay the execution of the order of injunction in order to continue to exhibit the film pending appeal filed a bond and the court stayed the enforcement (See 29 *O. Jur.* 2d 410, Injunctions, Par. 181, as to the terms and conditions of a decree or order). The defendants shall now account for the box office receipts arising out of the exhibiting of the motion picture film entitled "Without a Stitch," from the effective date of the court of common pleas order enjoining the presentation of the film, September 19, 1970, up to and including the final performance. The majority of the court are of the opinion that not to sequester the receipts would render the lower court's

order a nullity. The box office receipts shall be paid to the Lucas County Treasurer, the costs are assessed against the defendants. Counsel for the plaintiff will prepare a judgment entry to be submitted to counsel for defendants.

WILEY, J., concurs.

BROWN, J., concurring in part, and dissenting in part.

I concur in the granting of the permanent injunction against defendant and the other remedial relief provided by Chapter 3767, Revised Code, and stated in the last paragraph of the majority opinion, and accept the excellent analysis of the law leading to the final judgment, but I dissent from that part of the judgment which orders the defendants to account for the box office receipts arising from exhibition of the film from the date of the common pleas court injunction on September 19, 1970, up to and including the final performance.

The only hinge upon which such an accounting order for box office receipts could swing is the common pleas court injunction order of September 16, 1970, which, inter alia, provides:

> "* * * And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly, or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.
>
> The question of forfeiture as prayed for in the petition is stayed, pending final adjudication. * * *"

and the appeal bond filed on September 16, 1970, pursuant to this common pleas injunction decree, which, inter alia, provides:

> "In the event that there is a final affirmance of the judgment of said Court of Common Pleas of Lucas County, Ohio, and said defendant, and/or any other defendants, pay all court costs and damages or forfeitures which may be assessed by said Court of Common Pleas then this obligation shall be void; * * *"

Such a hinge is insufficient to swing such a sweeping relief as an accounting for profits or receipts which, in substance, amount to a forfeiture or penalty. This is so for a number of reasons.

The foregoing decree, and the appeal bond, even if it is considered a contract by the defendants to pay a forfeiture which may be assessed upon affirmance upon appeal, is the only slender reed upon which the forfeiture decree of box office receipts is based. There is no lawful authority or foundation, statutory or otherwise, creating such a right or remedy of forfeiture. The parties cannot, by a contract, whether it be an appeal bond or otherwise, create jurisdiction by way of a new right or remedy such as forfeiture and agree to give a court such jurisdiction where no such right, remedy, authority or jurisdiction exists independently. 31 *O. Jur.* 2d 518, Sec. 28.

Chapter 3767, Nuisances, Ohio Revised Code, under which the present injunction proceedings were maintained, provides for various remedies, in addition to permanent injunctive relief, such as is granted in the last paragraph of the majority opinion based upon Secs. 3767.06 and 3767.09, Ohio Revised Code. However, in this statutory structure for relief in nuisance cases there is singularly and glaringly absent any statutory provision for accounting for and paying over to the county treasurer or any other public body or officer the box office receipts arising out of exhibition of the film, which amounts to a forfeiture or penalty. Expressio unius est exclusio alterius. 50 *O. Jur.* 2d 165, Sec. 188. A strict construction is generally accorded statutes which impose restrictions upon the use of private property, which, in general, interfere with private property rights or which permit the summary divestiture of title to property. *Perkins v. Hattery,* 106 App. 361, 50 *O. Jur.* 2d 273, Statutes, Sec. 289.

Only where a penalty or forfeiture is mandatorily fixed by statute will equity, as a rule, apply the requirement of the statute. *Miller Oil Co. v. Abrahamson,* 252 Iowa 1058, 109 N.W.2d 610; *State v. 1920 Studebaker Touring Car,* 251 P. 701, 120 Oregon 254; *People v. Laport,* 28 Ill. App. 2d 139, 171 N.E.2d 95; 20 *O. Jur.* 2d 84, Sec. 37;

27 *Am. Jur.* 2d 606, Sec. 84; 66 *CJS* 934, Sec. 130.

In the absence of authority duly delegated to a court of equity, such court does not have equitable power or jurisdiction to enforce a forfeiture against the property such as a forfeiture of the profits accruing from property decreed to be a nuisance. 41 *O. Jur.* 2d 169, Nuisances, Sec. 75; 39 *Am. Jur.* 442, 446, Secs. 171 and 173; 66 *CJS* 934, Nuisances, Sec. 130.

Further, even if there is power to assess or determine a forfeiture on the basis of agreement of the defendant as expressed in the appeal bond, in consideration of a stay of execution (and this is gravely doubtful), that upon final affirmance of the judgment of the court of common pleas the defendants "pay all court costs and damages or forfeitures which may be assessed by said court of common pleas" cannot support an interpretation extended to mean that defendants agreed to a forfeiture to be assessed by the Court of Appeals as is done in the present case.

The order for an accounting of box office receipts is predicated, as indicated in the last paragraph of the majority opinion, upon 29 *O. Jur.* 2d 410, Injunctions, Sec. 181, which is entitled "Terms and Conditions of Decree or Order" and concerns itself with the conceded power of a court of equity in granting an injunction to attach to it, as a condition precedent to its effect, terms and limitations designed to serve the ends of justice. *State ex rel. Cleveland Court of Appeals,* 104 Ohio St. 96. This principle is sound law but wholly unrelated to the present case. The trial judge's injunction order, the pertinent parts being recited in the third paragraph of this concurring opinion, is entirely silent on the terms and conditions of the appeal bond and does not state that an accounting of box office receipts should be a condition of the appeal bond, and, on the contrary, states that the question of forfeiture "is stayed, pending final adjudication," whatever that means.

Neither is there anything in the transcript and pleadings of the common pleas court stating that an accounting for box office receipts or forfeiture thereof is made by order of the common pleas court a condition of the appeal

bond staying execution of the judgment. The fact that the appellant and his company surety inserted the clause "forfeitures which may be assessed in said common pleas court" in the appeal bond does not make it a condition of the appeal bond "as is directed by the court making the order which is sought to be superseded" as provided by section 2505.09, R.C., or "as the court may provide" as authorized by section 2505.14, R.C., or "on such terms as are prescribed by the court in which the appeal is filed" as authorized by section 2505.17, R.C. *Booher v. Lowe*, 79 App. 490; 3 *O. Jur.* 2d 248, Appellate Review, Sec. 346, Conditions and Requisites of Bond.

Furthermore, the insertion of the clause concerning "forfeitures" as part of the conditions in the appeal bond is contrary to the mandatory statutory provisions of Sec. 2505.14, R.C., regulating the conditions of an appeal bond operating as a stay of execution, which provides, inter alia, as follows:

> "* * * shall be * * * subject to a condition to the effect that the party appealing shall abide and perform the order and judgment of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of said appeal * * *"

Hence, the common pleas court did not provide or prescribe or direct by order that the appeal bond contain a condition therein that defendants pay any forfeitures assessed (See *Booher v. Lowe, supra*) and, secondly, the common pleas court was mandatorily precluded by Sec. 2505.14, R.C., from making assessment of forfeitures a condition of the appeal bond.

Therefore, the reference to "forfeitures" in the injunction decree of the common pleas court and in the appeal bond filed in that court is a nullity and meaningless. In passing, the observation should also be made that the common pleas court did not determine or assess any forfeiture but postponed it pending appeal.

There is no Ohio case that has established as a principle of law that an injunction decree abating a nuisance

carries with it an ancillary right to a forfeiture of the profit which arose from the nuisance abated. 41 *O. Jur.* 2d 167 et seq., Nuisances, Secs. 73, 74, 75; 29 *O. Jur.* 2d 409 et seq., Injunctions, Secs. 180 to 183 inclusive; 20 *O. Jur.* 2d 85 et seq., Equity, Secs. 39 and 40. This is true of the law generally in the United States. A court, in granting equitable relief by injunction, may impose such terms and conditions as are demanded by justice and regard for righteous conduct, but it may not impose conditions which lie outside its judicial power. *White v. Massee,* 202 Iowa 1304, 211 N.W. 339, 66 ALR 1434; 42 *Am. Jur.* 1101, Injunctions, Sec. 301, Terms and Conditions; 43 *CJS* 951, Sec. 217.

Although a court of equity has judicial power to abate a nuisance by injunction and the right to private property are subservient to the public right to be free from nuisances, which may be abated without compensation to the owner of the offending property, yet the guarantee of due process of law prohibits the confiscation or forfeiture of property without compensation except where the property is taken in a valid exercise of the police power. 15A *CJS* 362, Confiscation; 16A *CJS* 915, 1089, Constitutional law, Sec. 645, 679; 36 *Am. Jur.* 2d 611, 622, Forfeitures and Penalties, Secs. 1, 15 and 16; 24 *O. Jur.* 2d 522, 524, Secs. 2 and 4.

The state or municipality may enact laws and ordinances imposing forfeitures on certain classes of acts, and will enforce the peace and dignity of the state or municipality and these laws and ordinances are within the police powers of the state or municipality and valid so long as they are within the specific and clear limitations in the constitution. *Lindsay v. City of Cincinnati,* 172 Ohio St. 137; 24 *O. Jur.* 2d 523, Forfeitures and Penalties, Sec. 3; cf. *Gribes v. Department of Liquor Control,* 153 Ohio St. 77. Forfeitures and penalties are regarded as odious, not being favored either in equity or at law, and statutory provisions for a forfeiture must be strictly construed. *State ex rel. Lukens v. Industrial Commission,* 143 Ohio St. 609; 24 *O. Jur.* 2d 524, Sec. 4; cf. *United*

States v. Lovitt, 328 U.S. 303, 18 ALR2d. 291, and 16 *Am. Jur.* 2d 754, Sec. 413.

Naturally flowing from the foregoing legal proposition is the following principle of law. In the absence of statute or other legislative enactment, the constitutional guarantee of due process of law prohibits the confiscation or forfeiture of property without compensation by order of any court. 16 *Am. Jur.* 2d, 689, 964, Secs. 361 and 550; 36 *Am. Jur.* 2d 622, Sec. 16; 16A *CJS* 913, Sec. 645; 37 *CJS* 6, Sec. 3; cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469. That part of the decree in the present case which orders forfeitures of box office receipts violates all the principles and constitutional prohibitions heretofore discussed and contained in the text and cases cited, and is therefore unconstitutional.

Neither can the box office receipts be ordered confiscated or forfeited as contraband, a term sometimes defined as an article which cannot be owned or possessed legally, or such as is capable of use only in the commission of a crime. Box office receipts are not contraband. 17 *CJS* 510.

The decree of this court ordering an accounting and forfeiture of box office receipts, by reason of its unconstitutionality, exceeds the jurisdiction and legitimate powers of this court of appeals and is an open invitation to the party whose property is confiscated to resort to a utilization of an extraordinary writ or remedy to prohibit such unconstitutional confiscation. 44 *O. Jur.* 2d 209, Sec. 26; 28 USCA, Chapter 85, Sec. 1331 and Footnotes 139 and 142, and Sec. 1332, Footnote 156, and Chapter 155, Secs. 2281 and 2283; *Elliott Advertising v. Metropolitan Dade County* (C. Ap. Florida 1970), 425 F.2d 1141.

However, a confiscation or forfeiture of property must occur in the valid exercise of the police power. Such police power regarding confiscation or forfeiture of property requires statutory provisions permitting and regulating the forfeiture proceedings consistent with due process of law, and such statutory provision or a forfeiture must be strictly construed. 24 *O. Jur.* 2d 524, 525, Secs. 4 and 5.

In the instant case there was no statutory remedy or procedure providing for the confiscation or forfeiture of the box office receipts derived from the exhibition of the offending film. Hence, the forfeiture order is a nullity and violates the constitutional guarantee of due process of law. Article I, Secs. 1, 16, and 19, Ohio Constitution; United States Constitution, Article I, Secs. 9 and 10, Fifth and Fourteenth Amendments; 16 *Am. Jur.* 2d 751, Sec. 411, p. 698, Sec. 368.

Too much significance is placed in this case on the language in the common pleas court final decree and in the appeal bond staying execution which provides in effect that: "and or any other defendants pay all court costs and damages or forfeitures which may be assessed by said court of common pleas" in the event of final affirmance of the judgment of the court of common pleas. Suppose the decree and appeal bond had decided that defendants, in addition to paying all costs, damages or forfeitures, would also "pay all fines and penalties and serve all jail sentences that might be imposed by the common pleas court upon affirmance on appeal"? Would this agreement or statement of defendants in the appeal bond and any reference to it in the permanent injunction decree of the common pleas court give the court of appeals or the common pleas court power and jurisdiction to assess a $10,000 fine on any of the defendants or impose a 6-month jail sentence on any defendant? The answer is obviously in the negative. For the same reason the court of appeals and the common pleas court cannot assess a forfeiture or cause a confiscation of property where no such power or jurisdiction has been granted by law to the courts. The defendants, by a statement in the appeal bond, referring to forfeitures, or to any other matter such as crimes or jail sentences, cannot create jurisdiction of the subject matter in a court. In the present case, the court lacks jurisdiction of the subject matter of confiscation or forfeiture of private property of the defendants. Jurisdiction to render judgment in a case in which the court lacks jurisdiction of the subject matter cannot be acquired by consent of the parties. 31 *O. Jur.* 2d 518, Sec. 28.

For the foregoing reasons this Court should make no order concerning confiscation or forfeiture of the box office receipts obtained by exhibiting the offending film in this case.

It is readily conceded that confiscation of the box office receipts obtained by defendants who trafficked in smut in this case is a desirable solution and a desirable court decree, and is a method to deter the continued offensive conduct of defendants. However, what is desirable in this, and in many other situations, is not the equivalent of what is lawful or within the powers of this court or any other court to grant.

FOOTNOTES

[1] Among the laws of Ohio which are indicative are the following: See Sec. 2905.34, R.C., the pertinent parts of which are quoted below:

> "As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:
>
> "(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> "(1) Its dominant appeal is to prurient interest;
>
> "(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> "(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a

dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral or artistic purpose. * * *

"(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

"(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

This statute was effective September 15, 1970, after the filing of the complaint, but before the decision in the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:

R.C. 2905.08—Adultery or fornication;
R.C. 2905.10—Inducing illicit intercourse;
R.C. 2905.26—Prostitution, lewdness and assignation defined;
R.C. 2905.30—Indecent exposure;
R.C. 2905.31—Nudism;
R.C. 2905.44—Sodomy.

APPENDIX H

Judgment Entry of the Court of Appeals of Lucas County, Ohio

(Filed August 18, 1971)

(Title omitted in printing)

This day this cause came on to be heard and was heard as a trial de novo on the appeal of defendants-appellants from a decision of the Court of Common Pleas of Lucas County, Ohio.

The court, being fully advised in the premises, finds that applying the tests set forth in *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) and a book named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass., 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966), the motion picture film "Without A Stitch" is obscene; that the public exhibiting of it is a nuisance under the applicable provisions of Chapter 3767, Ohio Revised Code; that said provisions are constitutional; that the defendants, and each and all persons acting for them, should be permanently enjoined from exhibiting said motion picture film; that the Westwood Art Theatre, where said motion picture film was exhibited should be closed for one year from the date hereof; that a tax of $300.00 should be imposed on the defendants and against the real property upon which said Westwood Art Theatre is located; that the defendants should account for the box office receipts arising out of the exhibiting of said motion picture film from the effective date of the Common Pleas Court order enjoining the presentation of said film, September 19, 1970, up to and including the final performance; and that said box office receipts should be paid to the Lucas County Treasurer.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion picture film "Without A Stitch" is obscene and that the public exhibiting of it is a nuisance

under the applicable provisions of Chapter 3767, Ohio Revised Code.

IT IS FURTHER ORDERED that the defendants, and each and all persons acting for them are permanently enjoined from exhibiting the motion picture film "Without A Stitch."

IT IS FURTHER ORDERED that the Westwood Art Theatre be closed for one year from the date of the filing hereof.

IT IS FURTHER ORDERED that a tax of $300.00 is imposed on the defendants and against the real property upon which said Westwood Art Theatre is located.

IT IS FURTHER ORDERED that the defendants and each of them forthwith account to this court for the box office receipts arising out of the exhibiting of the motion picture film entitled "Without A Stitch" from the effective date of the Court of Common Pleas order enjoining the presentation of the film, September 19, 1970, up to and including the final performance and that defendants thereupon pay said box office receipts to the Lucas County Treasurer.

IT IS FURTHER ORDERED that costs be assessed against the defendants.

To all of which defendants except.

APPENDIX I

Findings of Fact and Conclusions of Law of the Court of Common Pleas of Lucas County, Ohio

(Filed September 16, 1970)

(Title omitted in printing)

FINDINGS OF FACT

The Court on the evidence, the exhibits and on the motions of the parties makes the following findings of fact;

1. That the Plaintiff, Clark L. Ewing, is a resident of Lucas County, Ohio, and brought this action in the name of the State of Ohio, pursuant to Section 3767.01 et seq. of the Ohio Revised Code for the purpose of attempting to enjoin the exhibition of the motion picture film "Without a Stitch," which has been playing at the Defendant, Westwood Art Theatre, hereinafter called Defendant Theatre, since July 17, 1970. Said Defendant Theatre being located in Lucas County, Ohio. It is an attempt to abate the same as an alleged public nuisance in the City of Toledo, Lucas County, Ohio. That the first newspaper advertisement for said movie appeared July 17, 1970, in Toledo, Lucas County, Ohio (See Exhibit 1). The next day's advertisement was identical to Plaintiff's Exhibit 2, both advertisements being selected by the Defendant, James Westcott, Manager of the Defendant Theatre from a press book prepared by the Velde Company of New York City, from advertisements prepared by an advertising agency hired by the Defendant, Tonylyn Productions, Inc.

2. That the Defendant Art Theatre Guild, Inc., is a corporation organized under the laws of the State of Ohio and operates the Westwood Art Theatre at 1602 Sylvania Avenue, Toledo, Ohio. That said defendant, James Westcott, is the Manager and person in control of the operation of said Theatre, and it is a conventional closed indoor theatre.

3. That both the newspaper advertisements and the marquee of the Defendants Theatre from July 17, 1970, to

the date of the hearing herein, informed the public that the movie "Without a Stitch" is rated "X", a rating self-imposed by the Defendant Westcott. That the rating X is taken generally to mean that a movie is not acceptable for persons under the age of 18, and that they are not to be admitted. The only method for determining whether a prospective patron is under 18 is by their appearance and that there is no guarantee that the movie was not exhibited to juveniles, albeit unintentionally. The casual policing of possible juveniles brings this facet of the operation close to the strict prohibition against juvenile exposure.

4. That the Defendant Theatre is operated in leased premises by the Defendant Art Theatre Guild, Inc., an Ohio Corporation wholly owned by Louis K. Sher, a resident of Beverly Hills, California, with the main office of the Defendant Theatre Guild, Inc., in Scottsdale, Arizona.

5. That the Defendant Tonylyn Productions, Inc., is a Corporation organized under the laws of the State of California. That it owns distribution rights in and to the motion picture film "Without a Stitch," as a result of which it is now and has been deriving revenues from the exhibition of said motion picture film in the county. That a portion of the income received by the Defendant Theatre for showing said movie, is paid to the Defendant Tonylyn by Art Theatre Guild, Inc. Sherpix is a wholly owned subsidiary of the Defendant, Art Theatre Guild, Inc., and that Sherpix purchased from the Defendant Tonylyn the right to fifty percent (50%) of the proceeds received from the exhibitors of the movie, "Without a Stitch." Plaintiff Exhibit 4 is an accurate continuity with pictures (of low quality) of the subject movie, that said movie is in color, 96 minutes long, primarily in Danish with English subtitles. That said movie was viewed in its entirety by the Court.

6. The movie specifically showed a simulated sexual relation between a seventeen and one-half year old girl and a treating physician; an attempted act of sexual intercourse with a young man which was incomplete. That the

physician's sexual intercourse as well as suggested cunnilingus and oral sodomy was purported to be a therapeutic treatment. That through the media of a holiday trip with background travelogue type photographs, the sexual morals of the various countries were attempted to be shown through the means of various normal, abnormal, and unlawful sexual approaches. That these involved an act of anal copulation involving the subject girl and a male companion as well as vaginal copulation between the subject girl and another male; sadistic-masochistic, sexual relationships between this subject girl and an adult male companion; the display of a dildo to this girl; this girl nude with a nude male and another nude female with the subject girl's sexual parts over the males genitals and the other female's sexual parts over the male's face, and the girls kissing each other; that this subject girl was also induced to make and participate in the making of a pornographic movie. There was also a scene suggesting lesbian activity.

7. That in addition to the pornography there were a number of scenes involving total or partial nudity resulting in visual creation of scenes leading to acts of male-female copulation, cunnilingus, sodomy, fellatio, lesbian relations and other sex play with the inference that these were a benefit, therapeutically, to her alleged sexual frigidity.

8. That said movie depicted that this minor girl not only was induced to and did engage in any type of sexual relationships, but she progressed first from being reluctant to engaging in sexual relations, then to a point where she'd be seduced in several hours, and finally to a point where she could be seduced in a relatively few minutes.

9. That the foreplay conversation and imagery leading up to expressed and implied sexual activity, the activity itself, and the immediate aftermath thereof, occupied about 60 minutes of the 96 minutes of the running time of the movie. The Court finds that the dominant theme of the movie taken as a whole from the above descriptions was one dealing with "the initiation rites of a

minor girl to an allegedly mature sex life" with an overemphasis on arousing prurient sex interests.

10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.R.C., Indecent Exposure
Sec. 2905.30 O.R.C., Solicitation of unnatural sex act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

There are existing similar statutes in the majority of states, giving an inference of national community standards.

11. That the depiction in the movie of the relationship between the alleged doctor, the minor girl, was unrealistic, unethical, and both as a course of conduct and as presented, was patently offensive.

12. That the movie "Without A Stitch" had either utterly no redeeming social value, as testified to by the Plaintiff and experts for both the Plaintiff and the Defendants, or on entertainment value and alleged story line so inane as to really be merely the vehicle and background for repeated simulated sexual acts of every nature, natural and unnatural, moral and immoral, lawful and unlawful.

13. That neither said motion picture nor the advertising and promotional materials which the defendants caused to be published in Lucas County, Ohio, "pandered" as said term is defined in *Ginzburg vs. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.

14. That said film did not constitute an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Said film is seen only by persons desiring to see it and paying an admission charge.

CONCLUSIONS OF LAW.

The court further makes the following conclusions of law:

1. That the definition of obscenity to be applied by this Court is that provided by the United States Supreme Court in *Roth vs. United States*, 354 U.S. (1957), which was in the following terms:

> "Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (354 U.S. at 489)

as amplified by Mr. Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al. vs. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), where he said:

> "Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,"

and as further amplified by this latter statement in the same decision:

> "the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

2. That as defined by Judge Leis of the Court of Common Pleas of Hamilton County, Ohio, in his opinion in the *State of Ohio ex rel. Charles H. Keating, Jr. vs. A Motion Picture Film Entitled "Vixen" et al.*, Case No. A. 242722 in said county, a copy of which has been supplied to the court, a prurient interest in sex "is an interest which is lewd in thought and/or desire. It is an interest inclined to, or characterized by lascivious thought in that which is inclined to lust; it is thought that is wanton or lewd."

3. That based on the findings of fact above the dominant theme of the movie "Without a Stitch" taken as a whole appeals to a prurient interest in sex.

4. That, as found by Judge Celebrezze of the United States District Court for the Northern District of Ohio, Eastern Division, in his decision, in *Grove Press, Inc., et al. vs. Anthony B. Flask, et al.*, Case No. C69-735, a copy of which decision has been supplied to the court, "depiction of preparation for an engagement in coitus, fellatio, cunnilingus and suggested acts of sodomy are "patently offensive' when shown in the exhibition of a film open to the general public over 18 years of age."

5. That based upon the findings of fact above and the preceding conclusions of law the movie "Without a Stitch" is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matter.

6. That if the movie had any social redeeming value such value was so slight that the defendants' emphasis on the sexually provocative aspects of the movie merits this court's accepting their evaluation of the movie at face value and finding that the movie is utterly without redeeming social importance.

7. That the movie "Without a Stitch" is obscene and that it is not protected by the First and Fourteenth Amendments to the Constitution of the United States.

8. That the Ohio Nuisance Statutes relied on by plaintiff herein, as found by Judge Celebrezze in the previously cited decision, are constitutional and that plaintiff has stated a cause of action thereunder.

9. That this court is not bound by the findings of the United States District Court for the Central District of California in Case No. C 69-2041-AAH, *United States of America, Plaintiff v. Three Cartons, more or less, Motion Picture Film, 17,770 feet interpositive, 9,600 feet soundtrack, entitled "Without a Stitch" et al., Defendants and Tonylyn Productions, Inc. Claimant,* for several reasons, but primarily because it was a case decided under customs law and not on all the issues raised herein.

10. That the fact that said movie has been displayed in other cities either with and without prior successful prosecutions is not probative in this case.

11. The dominant theme of the material taken as a whole being found an appeal to prurient interest in sex, and the material being patently offensive because it affronts contemporary community standards relating to the descriptions or representations of sexual matters, and the material being utterly without any redeeming social value, the court finds that in this film these elements coalesce.

COURT ORDER

The Court, therefore, finds that the Plaintiff is entitled to an order permanently enjoining the Defendants, each and all of them and all persons acting by, through, under, or in concert with them, from exhibiting the motion picture film entitled "Without a Stitch" in the State of Ohio. And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.

The question of forfeiture as prayed for in the petition is stayed, pending final adjudication.

That the Defendants are to pay the costs herein.

NICHOLAS J. WALINSKI, *Judge*